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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 804

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS, PETITIONER

v.

UNITED STATES OF AMERICA, EX REL. JEWELL G. DEAVERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas (R. 12-15) is not officially reported. The opinion of the Court of Appeals (R. 22-26) is reported at 171 F. 2d 961.

JURISDICTION

The judgment of the court below was entered on January 18, 1949 (R. 27). A petition for rehearing was filed on February 8, 1949 (R. 28) and denied on February 21, 1949 (R. 38). The petition

for a writ of certiorari was filed on May 20, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a veteran's suit to enforce reemployment rights, brought against his employer in accordance with Section 8 of the Selective Training and Service Act, is subject to dismissal by reason of the failure or refusal of the veteran to join, as parties defendant, other employees who might be affected by his proper restoration to employment.

STATUTES INVOLVED

The pertinent portions of the reemployment provisions of the Selective Training and Service Act, as amended (Section 8 of the Act of September 16, 1940, 54 Stat. 890, as amended, 50 U.S.C. App. 308) are set forth in the text of the argument, *infra*, pp. 4-5, 6.

STATEMENT

This reemployment suit under Section 8 of the Selective Training and Service Act was instituted on behalf of the veteran-plaintiff by the filing of a complaint on April 16, 1947 (R. 4). All necessary jurisdictional prerequisites under the statute were alleged (R. 2-3, 5-6). The purpose of the suit was to obtain for the veteran proper seniority status as a fireman in the employ of petitioner (hereafter called the railroad). The complaint alleged that the veteran had been employed by the railroad as a student fireman on October 26, 1936,

and that he had qualified for service as fireman on June 19, 1938 (R. 2, 5); that, prior to his induction into the military service on June 7, 1942, he had made runs for the railroad as fireman and that he was entitled to a seniority status as fireman available for service (R. 2-3, 5-6); that, upon his reemployment on January 9, 1944, he was entitled to seniority status superior to that of one D. H. Penton but that he was employed with seniority inferior to that of Penton (R. 3, 6); and that, had the plaintiff not been absent in military service, he would have occupied a seniority status superior to that of Penton (R. 4, 6). The complaint prayed that the railroad be required to accord the claimed seniority status to the veteran.

A motion to dismiss the complaint was filed by the railroad on May 26, 1947 (R. 7-12). The principal basis of the motion was the contention that not only Penton but approximately 90 other firemen on the railroad seniority roster would be affected by restoration of the plaintiff in accordance with his prayer and that, accordingly, the presence of each such employee in the litigation was necessary to the rendition of any judgment in the veteran's favor (R. 8-11).[1] In addition, the motion urged that the Brotherhood of Locomotive Fire-

[1] In connection with the burden which this defense seeks to impose on reemployable veterans, it is interesting to note, as a practical matter, that the names and whereabouts of the affected employees were and are apparently matters within the ready knowledge of the railroad (R. 8-11).

men and Enginemen and its Smithville Local were indispensable parties (R. 11).

On September 4, 1947, the district judge entered an order which overruled the motion to dismiss, on condition that the veteran's complaint be amended so as to add as parties all the individual employees who might be affected by restoration of his proper seniority status (R. 12-15). Compliance with this condition was declined on behalf of the plaintiff and an order dismissing the case was entered by the district court on November 7, 1947 (R. 16). On appeal, the district court's judgment was reversed and the case was remanded for trial (R. 26, 27).

ARGUMENT

1. The sole question presented for decision in this case was whether a suit to enforce veterans' reemployment rights, created by Congress in Section 8 of the Selective Training and Service Act, is fatally defective because the plaintiff fails to join as parties, in addition to the employer against whom he is seeking to enforce the statutory right, other persons who will or may be affected by the outcome of the litigation. In imposing an obligation to reemploy veterans, Section 8(b)(B) directs that employers "* * * shall restore such person [the veteran] to such position or to a position of like seniority, status, and pay * * *." Section 8(c) further defines the scope of the veterans' reemployment right. Section 8(e) creates jurisdiction in federal district courts to hear and

speedily determine a veteran's complaint in the event that an employer "* * * fails or refuses to comply with the provisions * * *" of Sections 8(b)(B) or 8(c). Section 8(e) empowers the district court "* * * to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate [the veteran] for any loss of wages or benefits suffered by reason of such employer's unlawful action. * * *"

We believe it clear that the district court erred in attempting to add to the statutory cause of action created by Congress a crippling condition precedent justified by neither the terms nor the policy of the statute, and that the court below correctly reversed the order of dismissal. The statute creates a plain right of reemployment in the veteran and a correlative duty in his employer. The cause of action created by the statute as a sanction to enforce this right-duty relationship runs solely between the veteran and the employer. The cause of action does not exist outside the statute and may not be varied from the statute's plain terms, particularly where, as here, the result of the variance would be to hinder and impede the enforcement of the right. Concededly, restoration of a veteran's proper seniority standing, the issue in this case, will affect the employer's relationship with other employees. But there seems to be no warrant for the erection of a rule which would shift the burden of solving these ensuing problems to the veteran-plaintiff as part of his affirmative show-

ing in order to have his day in court in asserting his reemployment rights.

We accordingly submit that the judgment of the court below is clearly correct. To the extent that the result reached is in conflict with the decision of the Court of Appeals for the Tenth Circuit in *Johnson* v. *Interstate Transit Lines,* 163 F. 2d 125, it should be observed that the question is of no future importance. The reemployment provisions of the Selective Training and Service Act were amended by the Act of June 24, 1948, P. L. 759, 80th Cong., 2d sess. Section 9 of this statute, which presently embodies veterans' reemployment right provisions, specifically provides that "(d) * * * only the employer shall be deemed a necessary party respondent * * * " to a suit brought to enforce reemployment rights.

2. Problems which arise in consequence of the restoration of a veteran to his proper seniority status are prematurely raised by petitioner herein. The sole question for decision below was on the district court order dismissing the complaint for want of necessary and indispensable parties. On that issue, the judgment of the court below was correct. The case will now go to trial on remand in order that the veteran's right to the claimed standing be established. Until judgment is reached on the merits of the veteran's claim, there is no occasion for considering the problems which may

devolve upon petitioner by reason of a judgment in the veteran's favor.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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JUNE 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 941762 999